NO. 12,294

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KURT GUSTAF NORDGREN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

On Appeal from the District Court for the Territory of Alaska, Division Number One.

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United States Attorney,
and
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STATUTES CITED

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PRELIMINARY STATEMENT

Appellant, who was the defendant below, brings this appeal from his conviction of the crime of bribery in violation of Title 18, U.S.C.A. Sec. 91, 1946 Ed. upon a verdict of a jury after a trial in the District Court of Alaska, First Division, at Juneau. The Honorable George W. Folta, presiding, sentenced appellant to imprisonment in a United States Penitentiary for a period of fourteen months and to pay a fine of $200.00

STATEMENT OF FACTS

Appellant, Kurt Gustaf Nordgren, a commercial fisherman, was owner and operator of the fishing ves-

sel LOIS W and on or about August 9, 1948, accompanied by two crewmen, Hugh Harris and Richard Harris, went into Red Fish Bay, Baranof Island, Alaska, and anchored at the north end of the Bay near the mouth of a stream. This bay is situated on the extreme south end of Baranof Island and is very narrow near the entrance which aptly bears the names of First and Second Narrows. The entire bay north of the Second Narrows was closed to commercial fishing at all times pertinent to this case.

William McKenzie, age 63, was employed from June 18, 1948 to August 22, 1948 by the Fish and Wildlife Service, Department of the Interior, United States of America, as a Fishery Patrol Agent, and with the duty of observing the area of Red Fish Bay closed to commercial fishing to prevent the taking of fish in the area, to report to the Fish and Wildlife Service any persons fishing in the area, and arrest or cause the arrest of any persons taking fish illegally in the area. McKenzie maintained a camp about 100 feet from the shore near the stream flowing into the north end of Red Fish Bay from June 23 to August 21, 1948, and remained in the area as the only Agent of the Fish and Wildlife Service continuously during the period. No other Fish and Wildlife officers or agents were in the area between August 9 and August 21, 1948.

Shortly after Appellant anchored his boat in Red Fish Bay on August 9, 1948, he engaged McKenzie in conversation briefly, about the fish in the Bay, then

left Red Fish Bay. Appellant and his crew returned on the LOIS W about 5:00 P.M. Appellant, alone, went to McKenzie's tent, where he again engaged the latter in conversation, saying "There is no reason why you cannot make $450 to $500 for yourself here," and that he would give McKenzie a share of the fish he caught. McKenzie at the time told Nordgren he was a Fishery Patrol Agent of the Fish and Wildlife Service.

On or about August 12, 1948, Appellant, together with his two crewmen, returned to Red Fish Bay on the LOIS W where Appellent, again alone, contacted McKenzie at the latter's tent and gave McKenzie two $100 bills, saying he was giving McKenzie one-sixth of the value of fish he had caught, having sold $1200 worth of fish, and that he would send McKenzie a post office money order for his part of other fish caught, after Appellant made his last trip. At the same time he asked for and received McKenzie's Juneau, Alaska Post Office address. McKenzie explained that he accepted the money only because he knew Appellant wanted to get the fish which were in the area of Red Fish Bay, closed to commercial fishing—that he was afraid he would be harmed by Appellant and his crew if he did not cooperate with them. He took the money and tried to get along until he could get away from the bay.

McKenzie observed Appellant and his crewmen fishing for and catching fish by means of the vessel

LOIS W and seine in the closed area of Red Fish Bay about August 15 and 16, 1948. On the latter date, Appellant told McKenzie he "shouldn't sit on the beach while we are making a haul, that way. Go back up in the woods. Someone might come and see you sitting there, and it might be a good idea for you to put the fire out when you go back in the woods."

On August 21, 1948, Milton Frank Harndin, Captain of the Fish and Wildlife Service Vessel SCOTER, together with his crewmen, picked William McKenzie up and took him to Sitka, Alaska. Immediately after going aboard the SCOTER, McKenzie reported the bribery and illegal fishing on the part of Appellant to Captain Harndin and showed him the two $100 bills, and also reported the matter to Gomer S. Hilsinger, Fish and Wildlife Agent in Sitka, Alaska, immediately upon his arrival, August 22, 1948. The money was produced and identified as evidence in the trial of the case.

It was on the basis of this and other evidence that Appellant was found guilty of bribery in violation of Title 18, U.S.C.A. Sec. 91, 1946 Edition.

ISSUES

I

THE EVIDENCE SUBMITTED SUFFICIENTLY PROVED WILLIAM McKENZIE, RECEIVER

OF THE BRIBE, WAS A PERSON ACTING FOR AND ON BEHALF OF THE UNITED STATES IN AN OFFICIAL FUNCTION, AND THUS NO ERROR WAS COMMITTED BY THE COURT IN REFUSING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL; AND MOTION FOR A NEW TRIAL.

The evidence submitted as proof that Government witness William McKenzie was a person acting for and on behalf of the United States in an official function may be summarized as follows:

McKenzie, a resident of Juneau, Alaska, was employed during June 18 to August 22, 1948, by the Fish and Wildlife Service, United States Department of Interior, as a Fishery Patrol Agent, which position was formerly known as Stream Watchman (T.R. 13, 20, 39-41). He was hired by Dan Ralston, head Law Enforcement Officer of the Fish and Wildlife Service (T.R. 39-40), and took the oath of office before Miss O'Neil of the same service (T.R. 39-40). McKenzie's salary as a Fishery Patrol Agent was paid by the Fish and Wildlife Service and by means of a Government check (T.R. 35). He was taken to Red Fish Bay, Baranof Island, Alaska on June 22, 1948 by the Fish and Wildlife Service (T.R. 23), and was also picked up by the Fish and Wildlife Service at the termination of his work (T.R. 35-37). A 12 foot boat owned by the Fish anld Wildlife Service was left with McKenzie for his use (T.R. 20).

McKenzie's duties as Fishery Patrol Agent were to observe the area of Red Fish Bay, Baranof Island, Alaska, closed to commercial fishing, by the laws of the United States and Regulation promulgated by the Fish and Wildlife Service, from the 2nd narrows in the entrance of the bay to the north end or head of the bay; to see that no one fished in the closed area (T.R. 14, 20, 25, 35, 40); and to report to the Fish and Wildlife Service any persons who fished in the closed area. (TR. 14). There wasn't much said about arresting anybody (T.R. 153). McKenzie, after performing the services described, reported to Captain Milton Frank Harndin, Master of the Fish and Wildlife Vessel SCOTER and Agent Gomer S. Hilsinger the facts relating to Appellant being in and fishing in the closed area of Red Fish Bay, Baranof Island, Alaska August 9 to 16, 1948, and receipt of the $200.00 from Appellant, together with the cirsumstances surrounding the same. (T.R. 36-37, 59-60).

Gomer S. Hilsinger, Fish and Wildlife Service Agent, stationed at Sitka, Alaska, testified that William McKenzie was an employee of the Fish and Wildlife Service on August 22, 1948 when McKenzie turned over to him two $100 bills advising him, Hilsinger, they were received from Appellant. (T.R. 61, 37, 38).

Appellant, admitting McKenzie was an employee of the Fish and Wildlife Service, contends that because the evidence did not show that McKenzie was appointed

by the Director of the Fish and Wildlife Service, he could not have been performing an official function of the United States under the Bribery Statute Title 18 U.S.C.A. Sec. 91. (Appellant's Brief pg. 9). He relies entirely on the provisions of Title 48 U.S.C.A. Sec. 227 which in substance states all employees of the Fish and Wildlife Service designated by the Director shall be considered peace officers and shall have the same powers of arrest of persons and seizure of property for violating provisions of the Alaska Fisheries Law as have United States Marshals or their Deputies.

Simply because this Statute (48 U.S.C.A. 227) confers upon certain employees designated by the Director of the Fish and Wildlife Service the power of arrest and seizure of property, it does not follow that all employees, including Fishery Patrol Agents, must be vested with such power and be appointed by the Director in the manner set out in the Statute, in order to be "persons acting for and on behalf of the United States in an Official Function," within the meaning of the Bribery Statute Title 18 U.S.C.A. Sec. 91, and within the authority conferred upon the Department of Interior in the supervision and control of the Alaska Fisheries under Title 48 U.S.C.A. Secs. 220 to 248b. The activities of William McKenzie in observing the area of Red Fish Bay closed to commercial fishing from June 23, to August 22, 1948, observing Appellant catching fish in the closed area, and reporting the facts to the Fish and Wildlife Service causing Appellant's arrest and prosecution, investigation of violations of the crim-

inal provisions of the Alaska Fisheries Laws, and preventing other persons from fishing illegally in the closed area, constituted official actions, duties and functions of the Deparement of Interior in enforcing the laws and regulations as well as the protection and conservation of the Alaska Fisheries for the benefit of all peoples in Alaska and United States. Indeed these are the very functions of the Fish and Wildlife Service.

The powers and functions of the Department of Interior, duties and responsibilities of employees in the supervision and control of the Alaska Fisheries are derived from all the statutes pertaining to the Alaska Fisheries, the regulations promulgated by the departments or agencies governing the same, any and all other applicable federal statutes and regulations, as well as the customs and usages established in the department.

In *United States v. Birdsall, et al.*, 233 U.S. 223, a bribery case in which the sufficiency of the indictment was the issue, the Court speaking of official duties and functions stated:

> "Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis (*United States v. George*, 228 U.S. 14, 22) for the charge in the present case, if the action sought to be influenced was official action. To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it

was governed by a lawful requirement of the department under whose authority the officer was acting. Rev. Stat., §161; *Benson v. Henkel*, 198 U.S. 1, 12; *Haas v. Henkel*, 216 U.S. 462, 480. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. *United States v. MacDaniel*, 7 Pet. 1, 14. (32 U.S. 1, 14). In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery."

United States v. MacDaniel, 32 U.S. 1, 14.

United States v. Ingham et al (D.C. E.D. Penn). 97 F 935.

Other statutes which confer authority upon the Fish and Wildlife Service in the performance of its functions in the conservation of Alaska Fisheries are:

Title 48 U.S.C.A. Sec. 241 which reads as follows:

"To enforce the provisions of sections 230 to 242 of this title and such regulations as he may establish in pursuance thereof, the Secretary of Interior is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries otherwise provided by law, from the officers and employees of the Department of Interior, a force adequate to the performance of

all work required for the proper investigation, inspection, and regulations of the Alaskan Fisheries and Hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of said sections."

This has particular reference, as applied to instant case, to the provisions contained in Section 232 of Title 48, and Section 234 of Title 48 concerning the closed season for salmon as provided in the first sentence of the latter section, and regulations made pursuant thereto, providing in effect that it is unlawful to fish for, take, or kill any salmon * * * * * "or during such further closed time as may be declared by authority conferred by law." * * * *

It was stipulated (T.R. 15, 16) that the area of Red Fish Bay, Baranof Island, Alaska, north of the second narrows, was closed to commercial fishing.

The Department of Interior, acting by and through the Fish and Wildlife Service, Reorganization Plan No. II, Sec. 4 (e) (53 Stat. at L. 1433) 76th Congress, 1st Session — Plan No. II — May 9, 1939. 48 U.S.C.A. 220. Title 3, Chap. IV. Reorganization Plan II, Book 1 C.F.R. 256, 1939 Supplement. Joint Resolution of June 7, 1939 (Public Res. No. 20) 76th

Congress, 1st Ses. Chap. 193. Reorganization Plan No. III, Effective June 30, 1940 (54 Stat. 1232), was authorized to prescribe regulations for the government of the department, distribution and performance of its business, 5 U.S.C.A. 22; delegate to subordinates power vested in the Department to take final action in matters pertaining to the employment, direction and general administration of personnel, 5 U.S.C.A. 22a. The head of the Department, or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons in the field service of his department or establishment, 5 U.S.C.A. 43.

Pursuant to authority granted in the last cited statute ample provisions were made for the employment of William McKenzie, as Fishery Patrol Agent, formerly known as Stream Watchman, by the Secretary of Commerce while the Bureau of Fisheries was under that department. This authority, duty and function was later transferred to the Department of Interior and Fish and Wildlife Service. Reorganization Plans No. II and No. III, supra. The regulations are as follows:

> Section 1.16 of Title 15 C.F.R. (Vol. 4, p. 410-411) provides SUBORDINATES DELEGATED TO EMPLOY CERTAIN FIELD PERSONNEL. Pursuant to the authority contained in the Act approved June 26, 1930 (46 Stat. 817; 5 U.S.C. 43), the power to employ personnel of the class indicated for duty in the field

service of the bureau specified is hereby delegated to the employees designated below:

(a) * * * * *

(b) Bureau of Fisheries. Employees authorized to employ: Commissioner; agent-caretakers, Pribilof Islands; masters of vessels; directors of biological stations; AGENTS AND ASSISTANT AGENTS, ALASKAN FISHERIES SERVICE; FIELD SUPERINTENDENT; DISTRICT SUPERVISORS; car captains; superintendents of fish cultural stations; heads of field parties.

Personnel authorized to be employed: Crews of vessels (below grade of engineer); LABORERS, MECHANICS, ASSISTANTS, GUIDES, AND STREAM WATCHMEN IN THE ALASKAN SERVICE; PERSONNEL EMPLOYED TEMPORARILY UNDER SCHEDULE A, SUBDIVISION XI, PARAGRAPH I OF CIVIL SERVICE RULES.

The Civil Service rules referred to are Title 5 C.F.R. Sec. 50.0 and 50.10 (Vol 1, p. 48 and 57 of C. F.R.) AND EXEMPT PERSONS TEMPORARILY CONNECTED WITH THE FIELD OPERATIONS OF THE BUREAU OF FISHERIES FROM EXAMINATION BY THE CIVIL SERVICE. (Emphasis added)

The Bureau of Fisheries with all its functions was transferred from the Department of Commerce to the Department of Interior effective July 1, 1939, by Reorganization Plan No. II. Sec. 4(e) (53 Stat. at

L. 1433) 76th Congress, 1st Session—Plan No. II—May 9, 1939. 48 U.S.C.A. 220. Title 3, Chap. IV, Reorganization Plan II, Book 1 C.F.R. 256, 1939 Supplement . Joint Resolution of June 7, 1939 (Public Res. No. 20) 76th Congress, 1st Ses. Chap. 193. Then by Reorganization Plan No. III, effective June 30, 1940 (54 Stat. 1232) the Bureau of Fisheries and the Bureau of Biological Survey of the Department of the Interior with their respective functions were consolidated into one agency in the Department of Interior known as the Fish and Wildlife Service.

The regulations published in the Federal Register and Code of Federal Regulations which have been recited herein are judicially noticed. 44 U.S.C.A. 307 and 311c, and the Court is respectfully requested to judicially notice the Regulations.

Sears v. United States (C.C.A.-1) 264 F 257

Thus we submit that William MacKenzie, employed as a Fishery Patrol Agent, in the investigation of violation of the Laws and Regulations of the Alaska Fisheries; prevention of illegal fishing in an area closed to commercial fishing; observing Appellant catching fish illegally; reporting the facts of Appellant's illegal fishing as well as the bribery to officials of the Fish and Wildlife Service, was a person acting for and on behalf of the United States in an Official Function, under and by authority of the Fish and Wildlife Service. Sec. 1.16 of Title 15 C.F.R. He was certainly

a Stream Watchman in the Alaska Service, or a person "employed temporarily under Schedule A, Subdivision XI, Parg. 1, of Civil Service Rules." 5 C.F.R. Sec. 50.0 and 50.10. The testimony of William McKenzie was sufficient to show that he was appointed by the Law Enforcement Officer or Agent of the Fish and Wildlife Service, which would be within the classes of employees, "agents and assistant agents, Alaskan Fisheries Service; Field Superintendent; District Supervisor" authorized to employ under Sec. 1.16, Title 15, C.F.R.

The case of *United States v. Remington* (C.C.A.-2) 64 F 2d 386 is in point. Appellant, a federal prohibition agent, was prosecuted for accepting a bribe to "lay off" prosecution of one Bastian. It was urged that the Appellant was not proved to be "an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or officer of the Government." The Appellant, the Government employee, himself testified that he was a federal prohibition agent. So did several of the Government witnesses, and the Court held the proof was sufficient.

Other cases in point are *Sears v. United States* (C.C.A.-1) 264 F 257; *Daniels et al. v. United States* 17 F. 2d 339, Cer. Den. 274 U.S. 744; *United States v. Ingham et al.* (D.C. E.D. Penn.) 97 F 935.

Appellant relies upon *Krichman v. United States* 256 U.S. 363, *Heaton v. United States* (C.C.A.-2) 280

F 697, and *Kellerman v. United States* (C.C.A.-3) 295 F 796. It is respectfully submitted that none of these cases are analogous to the case at bar. They are easily distinguishable, and do not support his contention.

In *Krichman v. United States, supra,* the person bribed was a baggage porter employed by the Pennsylvania Railroad while the railroads were under the control of the Federal Government during World War I. The Court apparently relying upon *United States v. Strang et al.* 254 U.S. 491, held in effect that the Pennsylvania Railroad was a separate entity from the Government. In instant case witness McKenzie was employed by the Fish and Wildlife Service, an establishment of the Department of Interior charged with the primary responsibility of conserving Alaska Fisheries.

Heaton v. United States, supra, was decided upon a defect in the indictment and is thus distinguishable. However the Courts of Appeals for the 6th Circuit and 8th Circuit have refused to follow the Heaton case. *Crimmian v. United States* (C.C.A.-6) 1 F 2d 643, 644; *Biddle v. Wilmot* (C.C.A.-8) 14 F 2d 505; *Dropps v. United States* (C.C.A.-8) 34 F 2d 15. It was expressly overruled by the 2nd Circuit in *United States v. Remington* (C.C.A.-2) 64 F 2d 386 which said that in view of these cases the Heaton case could no longer be considered the law. If by chance the Court should regard the Heaton case in conflict with instant case it is respectfully requested that the Court overrule it.

Kellerman v. United States (C.C.A-3) 295 F 796 was likewise decided upon the insufficiency of the indictment. In that case, and unlike instant case, the indictment charged bribing a "United States Customs Keeper" without alleging the person receiving the bribe was an officer of the United States, or a person acting for or on behalf of the United States in an Official Function. The Court held that the indictment did not disclose whether Sterner (receiver of the bribe) came within or without the particular class of Government employees which Title 18 U.S.C.A. Sec. 91 (1946 Ed.) contemplated.

II

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN INSTRUCTING THE JURY THAT WILLIAM McKENZIE WAS ACTING IN THE FUNCTION OF CONSERVING COMMERCIAL FISHERIES.

The evidence relating to McKenzie's employment and duties as a Fishery Patrol Agent of the Fish and Wildlife Service is set out under ISSUE NO. 1 of this brief, and reference is made to that section for the details. These facts are not disputed or controverted in any manner. They clearly show that McKenzie was employed to investigate violations of the Fishery laws and regulations, prevent fishing in the waters of Red Fish Bay which were closed to commerical fishing, and report to the Fish and Wildlife Service any person who

did catch fish in the area, and that he did so report that appellant caught fish in the closed waters. Such was a duty and function of the Department of Interior, acting by and through the Fish and Wildlife Service and its employees. 48 U.S.C.A. 220 to 248b, Reorganization Plans No. II and No. III, supra. This issue being uncontroverted, the Court did not assume any fact not proven by the evidence, nor misrepresent the law, but stated a relationship which actually existed. *United States v. Birdsall, et al.*, 233 U.S. 223.

It is said in 16 C.J. 950 Sec. 2329 "as a general rule, an instruction is not erroneous, as invading the province of the jury, because it assumes the existence of facts . . . .. . which are established clearly by uncontradicted evidence."

Wiborg v. United States 163 U.S. 632, 656.

The instructions given by the Court must be considered together and as a whole. *Walsh v. United States* (C.C.A.-7) 174 F 615, Cer. Den. 215 U.S. 609. *Horn et al. v. United States* (C.C.A.-8) 182 F 721, 739-740, Cer. Den. 219 U.S. 585. Excerpts or particular parts cannot be separated and considered apart from the whole instruction. *Martin et al. v. United States* (C.C.A.-10) 100 F 2d 490, 497, Cer. Den. 306 U.S. 649; *Hargreaves v. United States* (C.C.A.-9) 75 F 2d 68, 73, Cer. Den. 295 U.S. 759). The Jury was so instructed in No. 17 (T.R. 167-168). They were advised that they were the triers and exclusive judges of the facts in the case. The Court clearly left the ulti-

mate determination of the facts to the Jury as will be observed in the fourth paragraph of Instruction No. 1, Instruction No. 7 and Instruction No. 17 (T.R. 158, 161, 167-168).

In Federal Courts considerable latitude is allowed trial judges in instructing juries. They are governors of the trial for the purpose of assuring its proper conduct and of determining questions of law. In their discretion they may comment and express their opinion upon the evidence provided the jury is told that the determination of the facts rests entirely with them. *MacKnight v. Untied States* (C.C.A.-1) 263 F 832, 838, Cer. Den. 253 U.S. 493; *Tuckerman et al. v. United States* 291 F 958, 965 (a bribery case). The Court may further state that certain propositions are established by the evidence, such as McKenzie performing a function of the Department of Interior in conservation of the fisheries. *Zottarelli et al. v. United States* (C.C.A.-6) 20 F 2d 795, 799, Cer. Den. 275 U.S. 571.

In this case, whether McKenzie was performing a duty and function imposed upon the Department of Interior, by laws of the United States and regulations made pursuant thereto for conserving fisheries in Alaska, was a question of law for the Court and it properly instructed the jury on this issue.

Gratiot v. United States 45 U.S. 80, 117.

III

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR ACQUITTAL.

Appellee respectfully submits that the points of law and facts argued under Issues I and II of this brief support the Trial Court's denial of appellant's motion for acquittal at the conclusion of the Government's evidence, as well as the conclusion of all the evidence.

IV

THE TRIAL COURT DID NOT COMMIT ERROR BY NOT INSTRUCTING THE JURY GOVERNMENT WITNESS WILLIAM McKENZIE WAS AN ACCOMPLICE AND TO VIEW HIS TESTIMONY WITH DISTRUST.

The facts and circumstances relative to the bribery are summarized as follows:

McKenzie was employed as a Fishery Patrol Agent for the Fish and Wildlife Service and maintained a camp near the headwaters of Red Fish Bay, Baranof Island, Alaska. On August 9, 1948 appellant approached McKenzie and told him he could make Four Hundred and Fifty or Five Hundred Dollars for himself, to which McKenzie said "O.K." McKenzie advised appellant he was a Fishery Patrol Agent formerly known as Stream Watchman. Then on August

12, 1948 appellant, alone, approached McKenzie, showed him a fish slip and said "We are giving you one-sixth" and handed McKenzie two One Hundred Dollar bills; appellant asked for and recived McKenzie's Post Office address and said he would send him the rest of the money after the last trip. (Tr. 18-30). The money was identified and introduced as evidence (T.R. 26-30).

McKenzie was 63 years of age (T.R. 39). On August 9, 1948 he refused to go aboard appellant's boat for coffee, explaining that he thought appellant wanted the fish in Red Fish Bay and that he did not want to have any conversation with him. (T.R.. 19-21). As appellant approached McKenzie's tent on August 12, 1948 the latter stated he did not feel very easy when he saw appellant coming; that he made up his mind he would agree to any proposition appellant had to offer until he, McKenzie, got away from there, that he was afraid appellant and his two crewmen Hugh and Richard Harris, would put a rock around his neck and sink him into the bay; that he took the money from appellant and tried to get along until he could get away from Red Fish Bay (T.R. 20, 21, 43-45, 53, 56) and that appellant and his two crewmen were three "great big husky guys and they wanted them fish". (T.R.. 43)

McKenzie further testified that he was the only Fishery Patrol Agent at Red Fish Bay (T.R. 23, 42, 57); that he had only an outboard 12 foot boat, which

was not good for rowing, a 2½ horsepower motor which he could not start (T.R. 20-21, 25); that he had no means of communication and no means of travel other than the outboard boat (T.R. 24); that he was visited by the crew of a Fish and Wildlife Service Vessel only two weeks before August 9, 1948 and again August 21, 1948 (T.R. 23-24, 35, 52); that he left Red Fish Bay August 21, 1948 aboard the Fish and Wildlife Service Vessel SCOTER and reported the bribery to Captain Milton Frank Harndin soon after going aboard (T.R. 37, 52); and also reported the matter to Gomer S. Hilsinger, Agent for the Fish and Wildlife Service at Sitka, Alaska upon his arrival August 22, 1948 (T.R. 37-39); which was the first opportunity he had to report the bribery to officials of the Fish and Wildlife Service, or any other law enforcement agents. (T.R. 66-67).

When McKenzie's acceptance of the $200.00 Dollars from appellant on August 12, 1948 is viewed in the light of all the attending circumstances and his testimony, which the jury apparently believed, it is repectfully submitted that he was not an accomplice of appellant, and an instruction on the subject was not warranted.

People v. Bennett, (Sup. Crt. Appellate Div. N. Y.) 170 N.Y.S. 718 held that where the prosecuting witness prosecuted the affair with the knowledge, countenance, and approval of the Court, the District Attorney, and the Attorneys in the action, he was not

an accomplice. He "did not lure" defendant to the "commission of crime", but only offered him an opportunity.

In *Ritzman v. United States* (U.S.C.A.-D.C.) 3 F 2d 718, Ritzman, an army officer solicited a bribe from one Standley. The latter advised Attorneys of the Department of Justice who furnished marked bills for payment of the bribe. The Court ruled that Standley was not an accomplice.

In *Finley v. State* (Cr. Crt. of App. Okla.) 181 P 2d 849, where the witness, after being solicited for a bribe, paid it under direction of officers of the law, she was held not to be an accomplice. The Court said "the true test of whether Ruth Fugatt was an accomplice is whether she could be charged and punished for the crime with which the defendant is charged, or whether her participation in the offense was criminally corrupt."

Our position in this case is that there is no evidence that McKenzie was criminally corrupt, and the evidence reveals his participation in the actual commission of the crime was without criminal intent. Thus he cannot be regarded as an accomplice.

Appellant relies on *People v. Coffey* 119 P 901. It is pointed out that this case is no longer authority on this point in California. *People v. Martin,* (Dist. Crt. of Appeals) 300 P. 130, and *People v. Anderson* 242 P. 906, 909 held that the receiver of a bribe was not an accom-

plice of the giver so as to require corroboration of the former.

This point was not raised during the trial, and no requests were made for an appropriate instruction. Rule 30 of the Federal Rules of Criminal Procedure provide in part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

Though the Court may notice plain and serious prejudicial error, even though not assigned as error, "rarely, however, will a trial Court's judgment be reversed for failure to give instructions in the absence of a seasonable request or exception, ... and then only if the failure to instruct constitutes a basic and highly prejudicial error."

Cave v. United States, (C.C.A.-8) 159 F 2d 464, 469, Cer. Den. 331 U.S. 847, Reh. Den. 332 U.S. 786;

Kempe v. United States (C.C.A.-8) 160 F 2d 406, 411, Cer. Den. 331 U.S. 843;

United States v. Bushwick Mills, Inc., et al. (C.C.A.-2) 165 F 2d 198, 201-202;

Claunch v. United States (C.C.A-5) 155 F 2d 261, 263.

In answer to impeaching questions appellant stated he was convicted in the United States

Commissioner's Court at Sitka, Alaska for illegal fishing July 27, 1944, and August 26, 1947, the latter occasion for fishing in the waters of Red Fish Bay, Alaska, the scene of the crime in instant case. (T.R. 139). Two of his witnesses, namely, Hugh Harris and Richard Harris were convicted with appellant for similar offenses on August 26, 1947 (T.R. 94-95) and July 27, 1944 (T.R. 111) respectively.

Appellant's defense and theory of case was that he was not in Red Fish Bay, Alaska on August 12, 1948 and that he did not give the $200.00 to McKenzie (Testimony of Kurt Gustaf Nordgren T.R. 118-139, 134, 128-130; Testimony of Hugh Harris 75-76, 79, 81, 82-84; Testimony of Richard Harris, 101, 105-106). The jury decided against him (T.R. 4). Now appellant predicates his appeal upon the fact that the government witness McKenzie accepted the money from him and was therefore an accomplice.

Such contention is untenable on appeal. Even the case *Smith et al. v. United States* (C.C.A.-9) 173 F 2d 181, cited by appellant as authority for the Court to consider this error, though it was not raised during the trial, in affirming the lower court, stated "It is without question true that in a criminal case the ultimate issue is the guilt or innocence of the accused, to be determined by a fair trial and not the competence of counsel, *but it cannot serve the purpose of justice to permit a defendant to prosecute one theory in the trial court and, finding it unsuccessful, not only to*

substitute another on appeal but to claim error arising out of that which he himself has invited." (emphasis added)

Claunch v. United States (C.C.A-5) 155 F 2d 261, 263.

If appellant did not give the money to McKenzie, the latter could not have been an accomplice, and conversely if McKenzie was an accomplice, appellant of necessity, gave the money to him.

V

THE COURT DID NOT COMMIT ERROR IN REFUSING TO ADMIT EVIDENCE THAT APPELLANT WAS ACQUITTED IN UNITED STATES COMMISSIONER'S COURT FOR ILLEGAL FISHING AT RED FISH BAY AUGUST 10, 15 and 16, 1948.

Appellant alleges as error the refusal of the Court to admit evidence that defendant was acquitted in United States Commissioner's Court for illegal fishing in the waters of Red Fish Bay on August 10, 15 and 16, 1948. Appellant and his witness Hugh Harris emphatically denied catching any fish in the waters of the Bay (Appellant's testimony T.R. 134-135; Hugh Harris' testimony 79); Richard Harris denied it by inference (T.R. 106-107). This was against the testimony of one Government witness William McKenzie (T.R. 31-35, 49-52) to the effect that Appellant and his crew did fish on August 15, and 16, 1949. No ob-

jection was made to this testimony (T.R. 22-39) and is was further developed on cross-examination of the government witness (T.R. 44, 49-51, 53). Counsel for Defendant advised the Trial Court (T.R. 150) that the offered evidence was not a defense to the charge of bribery, but that it was offered for the purpose of giving the Jury a proper instruction as is shown in the argument under Issue No. 6 of this brief. The Court gave an instruction No. 14 (T.R. 166) in substantially the same language as suggested by Counsel (T.R. 54-55, 150-152).

The evidence of Appellant's illegal fishing on August 15 and 16, 1948 was connected with and was a constituent element of the bribery. It tended to establish his motive and intent in committing the offense of bribery. *Fall v. United States* (U.S.C.A.-D.C.) 49 F 2d 506, 512, Cer. Den. 277 U.S. 609.

It is respectfully submitted that Appellant's rights were adequately protected by the instruction suggested by his Counsel and given by the Court in No. 14 (T.R. 166), and Appellant not having objected that the instruction insufficiently restricted the consideration by the Jury of the evidence of illegal fishing he may not raise the issue on appeal. Rule 30, Federal Rules of Criminal Procedure.

Authorities cited by Appellant 16 C.J. p. 592, Sec. 1142, and 22 C.J.S. p. 1113, Sec. 690 are supported only by *Mitchell v. State*, 37 So. 76, and *Koenigstein v. State*, 162 N.W. 879. These authorities are cited in a

part of Corpus Juris and Corpus Juris Secundum which explain the principal that evidence of similar but separate and unconnected crimes may be shown as proof of the identity of the defendant in the crime charged, or to prove that the defendant was engaged in a plan or scheme of committing similar crimes to the one for which he was charged, which is an exception to the general rule that evidence of other offenses may not be introduced to prove the crime charged. They should therefore be distinguished from the case at bar. Here the evidence of illegal fishing was connected with and constituted a part of the bribery of McKenzie. *Fall v. United States, supra.* The jury could base its verdict only upon the evidence relating to the offense of bribery, and not upon the opinion of another jury in determining the same or different questions in another case in which the elements and facts of the offense were entirely different.

VI

THE COURT DID NOT COMMIT ERROR IN REFUSING APPELLANT'S REQUESTED INSTRUCTION NO. 1.

The instruction given by the Court on the point requested was Instruction No. 14, which reads as follows:

"Testimony has been admitted showing, or tending to show, that the defendant fished unlawfully in Red Fish Bay. This evidence was admitted not to

prove that the defendant violated the fisheries law, but to be considered by you in determining, in connection with all the other evidence, whether the defendant committed the crime charged in the Indictment." This Instruction substantially covered the point suggested by counsel for defendant before the trial court wherein he stated that the Court should instruct the jury "that the evidence of illegal fishing had been admitted here but may only be considered by the jury in so far as it may prove or tend to prove the charge of bribery for which the defendant is here on trial." (T.R. 54-55; 150, 151, 152.)

The trial court need not instruct the jury in the precise form and language as requested by defendant's counsel as long as the instruction fairly covers the points raised by the evidence.

Cataneo v. United States (C.C.A.-4) 167 F 2d 820, 824

Thayer v. United States (C.C.A.-10) 168 F 2d 247

Wheeler v. United States (U.S.C.A.-D.C.) 165 F 2d 225, 228, Cer. Den. 333 U.S. 829

Further, Appellant's requested Instruction No. 1 contained matter which was not in evidence, namely that defendant had been tried before a jury and found not guilty of three charges of illegal fishing in Red Fish Bay, Alaska, on August 10, 15, and 16, 1948.

CONCLUSION

No reversible error was committed by the Trial Court in this case. It clearly appears that William McKenzie was employed by the Fish and Wildlife Service, Department of Interior in the performance of duties and functions of that Department of Government, and that he was a person acting for and on behalf of the United States in an official function. No error was made in instructing the Jury that Government witness William McKenzie was performing a function of the Department of Interior as the evidence on this point was clear and not controverted. There was no evidence that McKenzie was an accomplice of Appellant, and therefore an instruction of caution in considering his testimony was not warranted. Further the Court did not commit error in refusing evidence of Appellant's acquittal in another case pertaining to illegal fishing at Red Fish Bay and instructing the Jury to consider the evidence of the illegal fishing only in so far as it tended to prove the bribery.

The judgment of the Trial Court should therefore be affirmed.

Respectfully submitted,

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